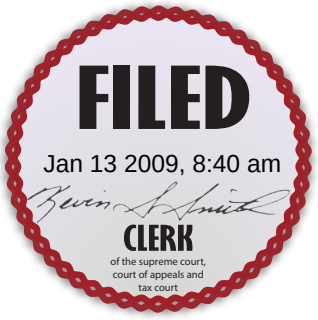

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IN THE COURT OF APPEALS OF INDIANA

ANNE L. HICKMAN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A04-0803-CV-184
	)	
STATE OF INDIANA, INDIANA DEPARTMENT OF CORRECTION, and STEVE CARTER, Attorney General of the State of Indiana,	)	
	)	
Appellee-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cynthia Ayers, Judge
Cause No. 49D04-0310-PL-1814

January 13, 2009

OPINION ON REHEARING - NOT FOR PUBLICATION

BROWN, Judge

Anne L. Hickman petitions for rehearing of a published opinion in which we affirmed the trial court's grant of summary judgment to the State of Indiana. Hickman v. State, 895 N.E.2d 353 (Ind. Ct. App. 2008). The facts, as noted in our opinion, follow:

> Hickman had worked for the Indiana Department of Correction for several years when she was placed on an unpaid thirty-day suspension on March 28, 2003. At the time of her suspension, Hickman had accrued 212.5 paid vacation hours pursuant to 31 Ind. Admin. Code § 1-9-3(a), which provides:
>
> > Vacation leave with pay shall be earned by all full-time employees in the non-merit service at the rate of seven and one-half (7.5) hours for each full month of employment. Employees working at least half time, but no less than a full-time basis, shall earn vacation at the rate of three and three-fourths (3.75) hours a month. Vacation will not be credited to hourly, per diem, temporary, intermittent, contractual, or employees working less than half time.
>
> After the thirty-day suspension, Hickman's employment was involuntarily terminated when she was dismissed effective April 27, 2003, and without payment for her accrued but unused vacation hours pursuant to 31 Ind. Admin. Code 1-9-3(f), which provides that "[u]pon separation from the service, in good standing, an employee shall be paid for unused vacation for a maximum of two hundred twenty-five (225) hours, plus overtime and holiday leave to the extent accumulated." 31 Ind. Admin. Code 1-10-4 provides that "[a]ny employee wishing to leave the non-merit service in good standing shall give the appointing authority at least two (2) weeks written notice in advance of separation." 31 Ind. Admin. Code 1-10-3(a) provides that "[a] dismissed employee shall forfeit all accrued sick, personal, and vacation leave."
>
> On October 10, 2003, Hickman filed a complaint arguing that the Department of Correction had a "legal obligation to pay her for unused vacation days upon her termination from employment [under] contract law and the Indiana Wage Claim Statute." Appellant's Appendix at 11. The State filed a motion to dismiss, and Hickman filed a motion to amend her complaint. The trial court entered an order denying the State's motion to dismiss and granting Hickman's motion to amend complaint.

> The State then filed a motion for summary judgment arguing that Hickman was not entitled to payment for her accrued but unused vacation hours because she had been dismissed and was not in good standing. In her opposition to the State's motion for summary judgment, Hickman argued that 31 Ind. Admin. Code 1-10-3(a) was "an unenforceable penalty under Indiana law." Id. at 16. After a hearing, the trial court granted the State's motion for summary judgment, finding that the State "was not obligated to pay Hickman for accrued but unused vacation days upon her termination from employment." Id. at 13.

Id. at 354-356.

In part of our opinion, we rejected Hickman's brief argument on appeal that the forfeiture provision in 31 Ind. Admin. Code 1-10-3(a) was an unenforceable penalty as follows:

> Hickman also likens 31 Ind. Admin. Code 1-10-3(a) to unenforceable penalty provisions in real estate contracts. The analogy does not hold, however, because, in the context of purchase agreements for real estate, a penalty is a "grossly disproportionate sum" imposed "to secure performance of the contract." Rogers v. Lockard, 767 N.E.2d 982, 991 (Ind. Ct. App. 2002). Here, there is no evidence that the forfeiture provision involved a grossly disproportionate sum imposed to secure performance of the contract, and we find Hickman's analogy unpersuasive.

Id. at 359 n.6.

In her petition for rehearing, Hickman again argues that 31 Ind. Admin. Code 1-10-3(a) is an unenforceable penalty. Specifically, she argues that the purpose of 31 Ind. Admin. Code 1-10-3(a) "was to secure the continued performance, i.e. work, of [Hickman]." Petition at 6. She argues that, when she "allegedly breached her employment contract with [the State] *by failing to perform her duties in a satisfactory manner*, then her vacation wages were forfeited pursuant to [the provision]." Id.

(emphasis added). However, the record is silent as to the reason for Hickman's dismissal, and Hickman does not provide a citation for the proposition that she was dismissed for failing to perform her duties. She could, for example, have been dismissed for misconduct. Thus, her argument that she was penalized for failing to perform her duties in a satisfactory manner is without support in the record.

The nature of her dismissal aside, Hickman must also show that the forfeiture provision imposed a sum grossly disproportionate to the loss which may result from the breach. See Rogers, 767 N.E.2d at 991. As noted in the opinion, Hickman presented no evidence on this matter. In her petition for rehearing, Hickman claims that she earned $16.04 an hour and, by multiplying her forfeited vacation hours by her hourly income, claims to have forfeited $3,408.50. However, Hickman does not provide citations to the record in support of these figures. Moreover, as noted above, there was no designated evidence as to the loss to the State.

Finally, in her petition, Hickman relies on cases dealing with liquidated damages provisions in contracts. See, e.g., Time Warner Entm't Co., L.P. v. Whiteman, 802 N.E.2d 886, 893 (Ind. 2004). "The term 'liquidated damages' applies to a specific sum of money that has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by one party for a breach of the agreement by the other, whether it exceeds or falls short of actual damages." Id. Assuming that Hickman's dismissal from her employment with the State can be construed as a breach of contract within the meaning of the language in Whiteman, Hickman's forfeited vacation time can hardly be

called a "specific sum of money that has been expressly stipulated by the parties." Hickman's reliance on such cases is therefore misplaced.

Hickman's arguments are speculative and not supported by the record or caselaw. Accordingly, although we grant rehearing to clarify our opinion, we affirm it in all respects.

BAKER, C. J. and MATHIAS, J. concur